A

PP

v.

KEE HANG BOON

B

HIGH COURT MALAYA, JOHOR BAHRU
MOHD ZAWAWI SALLEH JC
[CRIMINAL TRIAL NO: MT(3) 45-50-2007]
4 NOVEMBER 2008

C ***CRIMINAL LAW:*** *Penal Code - Section 302 - Causing death of deceased - Whether accused committed murder - Accused suffering from Huntington's disease - Whether mens rea established - Lack of motive - Whether prosecution failed to prove prima facie case for offence punishable under s. 302 of the Penal Code*

D ***CRIMINAL LAW:*** *Penal Code - Section 304A - Causing death by rash and/or negligent act - Whether act of accused rash and/or negligent - Whether accused aware of likelihood of damage or injury to others resulting from such conduct - Whether prima facie case established against accused under s. 304A Penal Code*

E

EVIDENCE: *Witness - Absence of - Failure to procure witness - Application to tender s. 112 statements of witness as evidence under s. 32(1)(i) Evidence Act 1950 - Whether admissible - Evidence Act 1950, s. 32(1)(j)*

F

EVIDENCE: *Witness - Credibility - Statements given by witness - Two different versions of incident given - Whether witness's statements and contemporaneous documents unreliable and untrustworthy - Whether of credible value - Whether contradictions and discrepancies minor in nature* G *- Whether created serious doubt on prosecution's case*

The accused was originally charged with murder, by causing the death of one Wesley Kee Zhi Heng ("the deceased'') punishable under s. 302 of the Penal Code ('the Code'). At the close of the case for the prosecution, the charge was reduced to one under H s. 304A of the Penal Code. The evidence adduced showed that on 4 March 2007, SP3 had received a call from one Dr Maziah of Hospital Pakar Puteri, Johor Bharu, who informed him that one Chinese baby boy aged five months was admitted to the said hospital. It was suspected that the boy (later identified as the I deceased) was abused. The deceased later died at the hospital. The post mortem revealed that the cause of death was due to blunt trauma of the head. The accused was the father of the

deceased and was suffering from Huntington Disease, the effect of which the accused was unable to control his movements. The mother of the deceased and wife of the accused, one Chua Chee Leng ('CCL') was the single and most important witness for the prosecution. She was the sole eye witness to the incident. CCL could not be located and the prosecution, relying on s. 32(1)(i) of the Evidence Act 1950, tendered her two s. 112 statements (exh. P17 and exh. P18). It was appropriate to examine the following issues namely (i) the application by the prosecution to tender two s. 112 statements of CCL as evidence under s. 32(1)(j) of the Evidence Act 1950; (ii) the position of a single witness and (iii) the police report lodged by CCL dated 4 March 2007 (exh. D13) and letter dated 15 March 2007 written by CCL to the prosecution (exh. D14) (iv) the credibility of CCL and (v) whether CCL's statements and contemporaneous documents were reliable.

Held:

(1) Reasonable research and exertion were made to procure CCL but CCL could not be found or that her attendance could not be procured without an amount of delay. Accordingly, the statements in exh. P17 and P18 were admissible as evidence. Further, in law a conviction could be sustained on the evidence of a single witness provided he/she is both reliable and credible (s. 134 of the Evidence Act 1950). The court also acceded to the request by the defence to introduce two documents *ie*, the police report lodged by CCL and letter written by CCL to the prosecution. (para 21)

(2) In essence, CCL had given two different versions of incident. The two versions were completely at variance with each other and completely contradictory. The first version said that it was an accident that the accused 'lepaskan' the deceased on the floor and in exh. D14, CCL used the words 'unintentionally and mishandling my four month old baby and caused my baby's death ...'. On the other hand, the second version suggested that the accused intentionally 'threw' ('buang') the deceased and subsequently hit the deceased's head several times. In other words, there was the intention to cause injury to the deceased. By reason of the above documentary exhibits, the prosecution had introduced two conflicting versions or sets of evidence in respect of the said incident. CCL's statements and all the contemporaneous documents

made by her (exhs. D13 and D14) when taken together made them totally unreliable and untrustworthy. They, therefore, had no credible value. (paras 30, 31 & 32)

(3) The contradictions and discrepancies were not minor in nature because they were militated against the meat or core of the prosecution's case. These contradictions and discrepancies not only affect reliability but also created serious doubt on the prosecution's case. There seemed to be no rhyme or reason for CCL to give two conflicting versions. The prosecution also did not proffer any reason why CCL had given two conflicting versions. It could not be disputed that CCL was not reliable nor credible. She was in fact an untrustworthy witness for the prosecution. (para 39)

(4) The accused was suffering from Huntington's disease, a neurodegenerative disorder which affects his movements over face, tongue, neck, trunk and limb which he would have no control. The medical evidence on the condition of the accused at the time of incident was not challenged at all. It could not be ruled out that the baby was dropped because the accused had no control over his upper limbs. There was no *mens rea* on the part of the accused to cause any injury let alone death to his own son. (paras 42, 43 & 44)

(5) There was absolutely no reason or motive for the accused to harm his child. The lack of motive in the instant case was an important indication that the act of the accused in dropping the deceased was involuntary because the accused was at the material time suffering from Huntington's disease. *Actus Non Facit Reum Nisi Mens Sit Rea* ('The deed does not make a man guilty unless his mind be guilty.' This maxim of common law is of fundamental importance in upholding the rule of law. To make a man liable to death for an offence which he does not know that he is committing and is unable to prevent is repugnant to the ordinary man's conception of justice and bring the law into contempt. (paras 46 & 47)

(6) It was for the prosecution to prove every element of the offence charged. One of the elements was the state of mind of the accused *('mens rea')*. Here, the necessary *mens rea* – if indeed the *actus reus* – had not been proved by the

prosecution. The prosecution had failed to prove a *prima facie* case for an offence punishable under s. 302 of the Code. (paras 49 & 50)

(7) However, the act of the accused in 'unintentionally and mishandling a four month old baby' knowing fully well that he was suffering from Huntington's disease, the effect of which he was unable to control his movements, was a 'rash' act within the meaning of s. 304A of the Code. From the time the accused got hold of the deceased, he must be taken to have assumed the responsibility not to do anything rash or negligent that may cause the deceased to drop. The accused could not have been unaware of the likelihood of injury to the deceased when he held the deceased. He was expected under the circumstances to have taken proper precautions to avoid causing the injuries to the deceased which he failed to do so. He was therefore rash or negligent. (paras 51 & 52)

(8) A *prima facie* case had been made out against the accused under s. 304A of the Code and the charge was amended accordingly. The amended charge was read and explained to the accused and he pleaded guilty to the charge. The court then found the accused guilty on the amended charge and he was sentenced to two years imprisonment with effect from the date of the arrest. (para 54)

[Order accordingly.]

Case(s) referred to:

Adnan Khamis v. PP [1972] 1 LNS 2 FC ***(refd)***
Adzahaar Ahmad & Anor v. PP [1996] 4 MLJ 85 ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 CA ***(refd)***
Chainchal Singh v. Emperor [1946] PC1 ***(refd)***
Chean Siong Guat v. PP [1969] 1 LNS 23 HC ***(refd)***
Goh Beng Seng v. Dol Dolah [1969] 1 LNS 46 HC ***(refd)***
Hashim Mat Isa v. PP [1950] 1 LNS 23 HC ***(refd)***
Leow Nghee Lim v. Reg [1956] 22 MLJ 28 ***(refd)***
Lynch v. DPP for Northern Ireland [1975] AC 653 ***(refd)***
Ooi Lean Chai v. PP [1991] 2 CLJ 1304; [1991] 1 CLJ (Rep) 337 SC ***(refd)***
Pie Chin v. PP [1983] 1 CLJ 316; [1983] CLJ (Rep) 703 HC ***(refd)***
PP v. Gan Kwong [1997] 2 CLJ Supp 433 HC ***(refd)***
PP v. Lam Peng Hoa & Anor [1996] 3 CLJ 747 HC ***(refd)***
PP v. Lee Eng Kooi [1993] 2 CLJ 534 HC ***(refd)***
PP v. Michael Anayo Akabogu [1995] 4 CLJ 79 HC ***(refd)***
PP v. Mogan Ayavoo [2004] 3 CLJ 623 HC ***(refd)***

A *PP v. Mohd Jamil Yahya & Anor [1994] 1 CLJ 200 HC* ***(refd)***
R v. Matheson [1958] 1 WLR 474 ***(refd)***
Sim Tiew Bee v. PP [1973] 1 LNS 138 FC ***(refd)***
Sweet v. Parsley [1970] AC 132 ***(refd)***
Tai Chai Keh v. PP [1948] 1 LNS 122 ***(refd)***
B *Warner v. Metropolitan Police Commr [1969] 2 AC 256* ***(refd)***
Yusoff Kassim v. PP [1992] 3 CLJ 1535; [1992] 1 CLJ (Rep) 376 SC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 112
C Evidence Act 1950, ss. 32(1)(i), (j), 134
Penal Code, ss. 302, 304A

Other source(s) referred to:
Sarkar on Evidence, edn, 15, p 109

D *For the prosecution - Husmin Hussin DPP*
For the accused - Hj Hisyam Teh Poh Teik & Co; M/s Teh Poh Teik & Co

Reported by Suhainah Wahiduddin

E

JUDGMENT

Mohd Zawawi Salleh JC:

The Charge

F

[1] The accused was originally charged with murder, by causing the death of one Wesley Kee Zhi Heng ("the deceased") on 4 March 2007, at about 1.50am, at house No. 113, Jalan Indah 1/16, Taman Bukit Indah, Gelang Patah, in the district of Johor
G Bahru, state of Johor Darul Ta'zim, punishable under s. 302 of the Penal Code ("the Code"). At the close of the case for the prosecution, the charge was reduced to one under s. 304A of the Penal Code. The accused pleaded guilty to the amended charge and was sentenced to two years imprisonment.

H

The Prosecution's Case

[2] The evidence adduced by the prosecution showed that on the 4 March 2007, at about 4.30am, one Lance Corporal Faizal bin Mohd Said (SP3) received a call from one Dr. Maziah of
I Hospital Pakar Puteri, Johor Bahru, who informed him that one Chinese baby boy aged five months was admitted to the said hospital. She told SP3 that she suspected the boy (later identified

as the deceased) was abused. The deceased later died at the hospital. On the same day, at about 2pm, SP4, ASP Abdul Hanif bin Atcha (the investigating officer), went to the mortuary at Hospital Sultanah Aminah. The deceased was identified as Wesley Kee Zhi Heng. The accused was there at that time. He is the father of the deceased. SP4 then asked the accused to be present at the police station.

[3] According to SP4, the deceased's mother, one Chua Chee Leng, told him that she had lodged a police report (later identified as exh. D13) which described how the incident happened. He also told the court that the accused showed him his position when he held the deceased and how he dropped the deceased. His investigation revealed that the accused is suffering from Huntington Disease, the effect of which the accused is unable to control his movements.

[4] The Post Mortem Report (exh. P15) revealed that the cause of death was due to blunt trauma of the head.

[5] Undeniably, Chua Chee Leng ("CCL") is the single most important witness for the prosecution. She is the wife of the accused and mother of the deceased who was the sole eye witness to the incident. CCL could not be located and the prosecution, relying on s. 32(1)(i) of the Evidence Act 1950, tendered her two s. 112 statements (exh. P17 and exh. P18).

[6] It cannot be doubted that the entire case for the prosecution rested on the following exhibits:

(i) Exhibit P17 given by CCL on 4 March 2007; and

(ii) Exhibit P18 given by CCL on 6 March 2007

[7] Before the court embarks on to discuss on the issue of credibility and reliability of CCL, at the outset it is appropriate to examine the following issues; namely:

(i) the application by the prosecution to tender two s. 112 statements of CCL as evidence under s. 32(1)(j) of the Evidence Act 1950;

(ii) the position of a single witness; and

(iii) the police report lodged by CCL dated 4 March 2007 (exh. D13) and letter dated 15 March 2007 written by CCL to the prosecution (exh. D14).

(i) The application by the prosecution to tender two s. 112 statements of CCL as evidence under s. 32(1)(j) of the Evidence Act 1950;

[8] It is quite obvious that the prosecution in this case is relying entirely on the evidence of the missing witness (CCL) by tendering her two s. 112 statements to fortify its case against the accused person.

[9] When SP4 (ASP Abdul Hanif bin Atcha), the investigating officer gave evidence, he stated that on 4 March 2007, he recorded statement under s. 112 of the Criminal Procedure Code ("CPC") from CCL and on 6 March 2007 he proceeded to record further statement from her in continuation of her statement which was earlier recorded by him. According to SP4, CCL stated in the statements to the police that she knew and saw what happened at the scene of the crime where the accused stood charged in this case.

[10] The prosecution contended that the requirement of s. 32(1)(i) of the Evidence Act has been met and all the prerequisite to the application of that provision has been satisfied. The learned defence counsel did not object to the application by the learned deputy public prosecutor to tender two s. 112 statements of CCL as evidence under the said section. However, the learned defence counsel argued that in admitting such statements, factors affecting the weight must be taken into account.

[11] Now, it is undoubtedly the law, that in a criminal case, the court is in no way bound to act on concession of the sort made by the learned defence counsel. The fact that no objection was raised by the learned defence counsel on the admissibility of exhs. P17 and P18 does not preclude the court from excluding inadmissible evidence on its own motion in the exercise of its ever vigilant duty as the guardian of justice in order to ensure that judicial decisions are made in accordance with law. Sharma J said in *Goh Beng Seng v. Dol bin Dolah* [1969] 1 LNS 46 HC:

> The mere fact, however, that counsel for the defendant in this case did not object to the admissibility of the statements of witnesses made to the police, does not excuse me from excluding such evidence if in fact and law it is not admissible. It is the duty of the court to disallow all inadmissible evidence even though no objection is taken to its admissibility. Inadmissible evidence remains inadmissible. It cannot be rendered admissible by failure of counsel to object to it.

[12] Similar stand was taken by the (then) Supreme Court in *Ooi Lean Chai v. PP* [1991] 2 CLJ 1304; [1991] 1 CLJ (Rep) 337 where Mohammed Azmi SCJ said:

> Further a waiver by an accused person could not be held against him in regard to rules of procedure and evidence in criminal proceedings. Any admission of inadmissible evidence, even with consent or by waiver of the accused was wrongful and such inadmissible evidence remained inadmissible evidence, the effect of which was open to any court to assess.

[13] In the light of this, the court has now to decide on the admissibility of exhs. P17 and P18.

[14] SPG (ASP Kwek Chuwen Hui), the officer who took over the investigation paper from SP4 testified that he had made several attempts to trace CCL by:

a) tracing the latest address from National Registration Department, Johor. He was told that the latest address of CCL is No. 132, Kampung Baru, Chendering, Jalan Tanjung Tualang, Batu Gajah. He had requested the assistance of ASP Raihana from IPD, Batu Gajah to trace CCL at the said address. When ASP Raihana went to said address, she was told by CCL's brother that CCL had not returned to such address for a long time;

b) contacting CCL's brother several times through his hand phone No. 016-5602875 but was told by the brother that he did not know about CCL's whereabout;

c) advertising in Sin Chew Daily for two consecutive days (exh. P16);

d) contacting the Immigration's Investigation Officer by the name of Hashim and was told that according to Immigration record, CCL had entered Malaysia from Singapore on 4 July 2008, 0847 hrs;

e) contacting CCL's family but was informed that they still could not trace her; and

f) directing police patrol car on 23 July 2008 to once against visit the latest address of CCL but could not find her there.

[15] Having considered the whole facts and circumstances regarding this aspect of evidence before me, I am satisfied that reasonable search and exertion were made to procure CCL but CCL could not be found or that her attendance could not be procured, without an amount of delay. Accordingly, I ruled that the statements in exhs. P17 and P18 are admissible as evidence (see *Public Prosecutor v. Gan Kwong* [1997] 2 CLJ Supp 433).

[16] The court is aware that where the proceedings concern a capital charge warranting mandatory death sentence upon conviction, the court is reasonably entitled to expect more strenuous efforts of greater tenacity (see: *PP v. Mogan Ayavoo* [2004] 3 CLJ 623, HC; *PP v. Lam Peng Hoa & Anor* [1996] 3 CLJ 747 HC, *Public Prosecutor v. Mohd Jamil b. Yahya & Anor* [1994] 1 CLJ 200 HC).

[17] The importance of proving the unavailability of the maker of the statement was highlighted in the Federal Court case of *Sim Tiew Bee v. PP* [1973] 1 LNS 138 where reference was made to *Chainchal Singh v. Emperor* [1946] PC1 in the words of Lord Goddard:

> Where it is desired to have recourse to this section on the ground that a witness is incapable of giving evidence, that fact must be proved, and proved strictly. It is an elementary right of an accused person or a litigant in a civil suit that a witness who is to testify against him should give his evidence before the court trying the case which then has the opportunity of seeing the witness and observing his demeanour and can thus form a far better opinion as to his reliability than is possible from reading a statement or deposition. It is necessary that provision should be made for exceptional cases where it is impossible for the witness to be before the court, and it is only by a statutory provision that this can be achieved. But the court must be careful to see that the conditions on which the statute permits previous evidence given by the witness to be read are strictly proved. In a civil case a party can, if he chooses, waive the proof, but in a criminal case strict proof ought to be given that the witness is incapable of giving evidence.

[18] It should be recalled that the prosecution sought to tender the documents under s. 32(1)(i) of the Evidence Act 1950. Whether s. 32(1)(i) and (j) must be read conjunctively or disjunctively is a matter of controversy and cases have been decided in both ways. (See *PP v. Michael Anayo Akabogu* [1995] 4 CLJ 79 *(supra)*; *PP v. Mohd Jamil bin Yahya & Anor* [1993] *(supra)* and *PP v. Lam Peng Hoa & Anor* [1996] *(supra)*. If it is read conjunctively, then the provision is only limited to the statements made by public officers. If it is read disjunctively, then it relates to a wide variety of statements. In the event the court adopts a conjunctive reading of paragraphs (i) and (j) of s. 32(1), then the statements in exhs. P17 and P18 are inadmissible. Without this vital piece of evidence, the foundation of the prosecution case collapses.

[19] I am inclined to agree with the views of Kang Hwee Gee J and KC Vohrah J expressed in *PP v. Lam Peng Hoa and PP v. Mohd Jamil bin Yahya & Anor (supra)* that the various paragraphs enumerated in s. 32 before the section was amended, each of the paragraph can be considered as spelling out a separate set of circumstances where a statement can be admissible. Each paragraph can stand on its own. So can each of the two inserted paragraphs. It would do violence to the scheme in the arrangement of the paragraphs to say that paras. (a) to (g) are to be interpreted in one way and (i) and (j) differently. I find no reason to differ from these decisions. Indeed, the court is persuaded that their reasonings are correct.

[20] The weight and degree of credit to be attached to such statements will be examined later in this judgment.

(ii) The position of a single witness

[21] In law, a conviction can be sustained on the evidence of a single witness provided he or she is both reliable and credible. This is made clear by Augustine Paul JCA (as he then was) in *Balachandran v. PP* [2005] 1 CLJ 85 where his lordship said:

> This means that the testimony of a single witness, if believed, is sufficient to establish any fact (see *Khaw Cheng Bok & Ors v. Khaw Cheng Poon & Ors* [1998] 3 MLJ 457). However, the facts and circumstances of a particular case may make it desirable for his evidence to be corroborated. As Sinha J said in *Vadivelu Thevar v. State of Madras* [1957] SC 614 at pp. 618-619:

A On the consideration of the relevant authorities and the provisions of the Evidence Act, the following propositions may be safely stated as firmly established:

1. As a general rule, a court can and may act on the testimony of a single witness though uncorroborated. One credible witness outweighs the testimony of a number of other witnesses of indifferent character.

2. Unless corroboration is insisted upon by statute, court should not insist on corroboration except in cases where the nature of the testimony of the single witness itself requires as a rule of prudence, that corroboration should be insisted upon, for example in the case of a child witness, or of a witness whose evidence is that of an accomplice or of an analogous character.

3. Whether corroboration of the testimony of a single witness is or is not necessary must depend upon facts and circumstances of each case and no general rule can be laid down in a manner like this and much depends upon the judicial discretion of the judge before whom the case comes.

[22] To summarize, s. 134 of the Evidence Act 1950 clearly states that no particular number of witnesses is required to establish the case. Conviction can be based on the testimony of a single witness if he or she is wholly reliable. Corroboration may be necessary when he or she is only partially reliable. If the evidence is unblemished and beyond all possible criticism and the court is satisfied that the witness was speaking the truth, his or her evidence alone can maintain conviction.

(iii) Exhibits D13 and D14

[23] It is trite law that the defence is entitled, through cross-examination of prosecution witnesses, to put its case at the earliest possible stage. Indeed, it behoves for the defence to do so because if a defence is sprung in court for the first time when the accused makes his defence from the witness box or the dock so that the prosecution is taken by surprise, the accused runs the risk of being branded as a recent invention. Perhaps it is not out of place in this context to refer to the judgment of Taylor J. in *Leow Nghee Lim v. Reg* [1956] 22 MLJ 28. At p. 28 Taylor J. said "... [A]n accused is entitled to the benefit of anything which can be elicited from the prosecution evidence ..."

[24] At the trial, the learned defence counsel had, in the course of his cross-examination of the investigation officer, ASP Abdul Hanif bin Atcha (SP4), sought to introduce two documents, ie, the police report lodged by CCL dated 4 March 2007 and a letter dated 15 March 2007 written by CCL to the prosecution. SP4 admitted that the two documents were in his possession and he had seen them. In the course of investigation, he had read the documents. The application was not resisted by the learned deputy prosecutor. The court acceded to that request.

The Credibility Of CCL

[25] In essence, CCL has given two different versions of incident as follows:

(a) The first version

The first version is manifested in the following documents:

(i) Exhibit P17 (112 statement dated 4 March 2007);

(ii) Exhibit D13 (police report dated 4 March 2007); and

(iii) Exhibit D14 (letter dated 15 March 2007).

(b) The second version

The second version is manifested in:

(i) Exhibit P18 (s. 112 statement dated 6 March 2007).

[26] The material parts of exh. P17 read as follows:

> Bagi menjawab soalan saya.
>
> Saya sudah berkahwin dengan suami saya sejak 13 Julai 2005. Saya mempunyai seorang anak berumur lebih kurang 4 bulan. Saya tinggal dengan emak suami saya (emak mertua). Di Singapore saya tinggal dengan suami saya di mana kami menyewa bilik. Saya kerja sebagai kerani di Textile Company. Tung Mung Textile, Singapore. Saya dah kerja lebih kurang 6 tahun. Sebelum itu saya kerja di Kilang Motorola di Singapore.
>
> Suami saya dulu belajar di TAR Kolej di KL. Dia ambil bidang Civil Engineering. Dekat TAR Kolej dia belajar selama 5 tahun. Di TAR Kolej dia buat diploma. Kemudian dia pergi ke England sambung belajar selama 3 bulan sahaja. Dia ambil degree dalam bidang Building Survey. Lepas itu dia kerja sebagai Projek

Engineer di Singapore. Dia sudah kerja lebih kurang 2 atau 3 tahun. Selepas itu dia pergi cari kerja lain. Saya tidak berapa ingat. Saya hanya ingat dia sudah berhenti kerja itu dan dia cuba kerja lain. Kemudian dia ada minta banyak kerja. Banyak kali dia tukar. Bila dia dapat kerja, tidak lama lepas itu dia berhenti sebab dia tidak dapat buat kerja. **Dia ada masalah kesihatan**. Syarikat tempat dia kerja kadang-kadang ada bagi kerja pada dia untuk siapkan. Tetapi dia tidak dapat siapkan. Sebab itu dia diberhentikan kerja. Dia sudah minta banyak kerja. Tapi susah mahu dapat. Walaupun kerja kilang pun dia susah mahu dapat. **Sekarang dia dapat kerja kilang di Singapore tapi sekarang bos dia tahu dia ada sakit**. Sekarang dia kerja biasa sahaja. Sebagai operator kilang biasa.

Pada mulanya saya tidak tahu suami saya tidak sihat. Dia nampak normal. Dia seorang yang berpelajaran dan dia memang suka membaca. Dulu dia boleh bercakap bahasa Inggeris tapi sekarang dia tidak boleh. Selepas saya lahir anak saya pada 24.12.2006, saya dapat tahu yang suami saya sakit. Kami semua sekeluarga baru tahu yang dia baru sakit. Dia tidak mahu cakap dengan semua orang. Abang ipar saya hantar dia ke Tan Toh Seng Hospital di Singapore baru dapat tahu yang dia ada penyakit. Dia sendiri pun baru tahu yang dia ada penyakit ini. Penyakit ini seperti Parkinson. Tapi penyakit ini lebih teruk daripada Parkinson. Ini seperti penyakit keturunan sebab bapa dia pun ada penyakit ini. Saya dengar ini daripada kakak ipar saya. Semasa saya kahwin, bapa mertua saya sudah meninggal.

Kesan-kesan dari penyakit ini seperti suami saya akan lupa ingatan, apa dia belajar dulu pun dia tidak ingat. Dia sekarang tidak boleh bercakap bahasa Inggeris. Kalau dulu dia fasih cakap. Dulu dia boleh guna internet dan dia cari apa jenis penyakit yang ada pada dia. Selain itu tangan dan kaki dia akan bergerak di luar kawalan. Apabila dia turun tangga, dia tidak balance dan dia selalu jatuh. Mata tidak ada masalah. Telinga dia ada masalah sedikit pendengaran. Selalunya dia tidak boleh kawal perbuatan dia. Penyakit ini lebih kepada masalah otak yang tidak dapat mengawal perbuatan dia. Kalau beri makan, kena potong kecil-kecil seperti daging ayam, sayur. Dia makan lambat. Dulu dia gemuk sikit dan selepas kami kahwin dia jadi kurus macam ini. Dulu dia pandai driving. Sekarang dia tidak driving. Dia tahu dia tidak boleh drive lagi.

Pada 4/3/07 jam lebih kurang 11 malam, saya sama suami saya dari rumah kakak ipar saya. Saya mahu bawa anak saya balik tidur. Saya ada panggil suami saya tidur awal. Dia ada masuk bilik tidur. Saya bangun dan tengok suami saya tidak ada di bilik. Saya tengok dia sedang baca surat khabar. Saya cakap dengan dia jangan baca lewat sangat dan pergi tidur cepat. Dia tidak mahu tidur dan saya terus pergi tidur. Kemudian tidak lama selepas saya

tidur, anak saya menangis dan saya terbangun tidur. Kemudian saya minta suami saya buat susu. Saya cuba bagi anak saya puting, tapi dia masih nangis. Kemudian suami saya ada buat susu bagi anak saya. Tapi anak saya masih nangis. Kemudian saya angkat anak saya. Saya bawa anak saya jalan di luar bilik tidur saya. *Suami saya mahu ambil anak saya. Masa itu anak saya masih dalam dakapan saya. Masa suami saya ambil anak, saya bagi anak saya tapi kemudian dia lepaskan anak saya dan anak saya jatuh ke bawah di hadapan saya iaitu di antara saya dan suami saya. Saya tengok dan terkejut sebab anak saya jatuh dan kepala yang jatuh dulu di atas lantai. Saya tengok suami saya tidak tahu apa yang dia buat. Dia tengok saya sahaja dan saya bawa anak saya keluar dan minta tolong pada jiran. Saya kemudian panggil suami saya kuat-kuat dan dia seperti tersedar dan kemudian dia tolong buka pintu untuk saya keluar minta tolong jiran. Jiran saya kemudian hantar ke klinik dulu dan doktor di klinik itu kata mesti dihantar ke hospital pakar. Masa sampai di hospital, anak saya masih bernafas lagi. Kemudian doktor bagi tahu saya dia sudah tidak bernafas lagi. Masa itu suami saya ada di hospital sahaja dan duduk diam. Dia seperti tidak sedar apa dia sudah buat selepas itu saya bagi tahu polis*.

S: Adakah anda ingin menambah keterangan anda?

J: Tidak

S: Adakah anda bercakap benar?

J: Ya.

[emphasis added]

[27] The material parts of exh. D13 read as follows:

Pada jam lebih kurang 0150 hrs 4/3/2007 semasa saya berada di rumah No. 113 Jalan Indah 1/16 Taman Bukit Indah, Gelang Patah. *Anak lelaki saya nama Wesley Kee Zhi Heng umur 4 bulan 2 minggu. Pada masa itu anak saya menangis hendak minum susu. Saya telah suruh suami saya tolong buatkan susu. Setelah diberi susu oleh suami saya anak saya masih menangis lagi. Saya ambil anak saya dan saya riba ia masih menangis lagi*.

Tiba-tiba suami saya dalam keadaan tension dan telah mengambil anak dari riba saya kemudian terus angkat dan lepas ke lantai. Saya dakap anak saya dan bawa keluar. Minta pertolongan jiran sebelah rumah. Dan saya bawa anak saya ke klinik Tun Aminah untuk rawatan. Doktor telah mengarahkan saya pergi ke hospital. Saya terus membawa anak saya ke Hospital Pakar Putri Johor Bahru. Dan telah dimasukkan dalam wad ICU. Pada jam 1400 hrs 4/3/2007 doktor pakar telah bagi tahu anak lelaki saya telah meninggal dunia. Inilah saya datang balai buat report. (emphasis added)

[28] The material parts of exh. D14 read as follows:

> *On 4/3/07 - 2am, my husband, Kee Hang Boon was unintentionally and mishandling my 4 month old baby and caused my baby's death on 4/3/07 - 11 am in Hospital Pakar Puteri*. Since the incident happened, I had close monitoring his behavior, I had concluded that he is mentally corrupted and now in insanity status. **The root cause of this incident is mainly caused by his sickness Huntington Disease**. My husband's family members all have the same thinking as mine, except my mother, she believe that some evil spirit that intruded and control him and cause him unaware of what he did. I have no objection about her judgment. Who know, in this world, it is still quite a lot of unexplained case that not able to proof by modern science ...
>
> [emphasis added]

[29] The material parts of exh. P18 read as follows:

> Bagi menjawab soalan saya
>
> Keterangan yang saya berikan sebelum ini adalah tidak tepat. Sekarang saya mahu ceritakan perkara yang sebenarnya. Pada malam itu, pada 4/3/07 jam 1.50 pagi, saya bangun dari tidur sebab anak saya menangis. Pada masa itu suami saya berada di luar di ruang tamu sedang membaca surat khabar Cina. Bila bayi saya menangis saya minta suami saya buatkan susu kepadanya. Suami saya ada membuat susu dan saya cuba memberikan kepada anak saya tetapi anak saya masih menangis dengan kuat. Pada masa itu saya sedang duduk di atas lantai di sebelah katil. Suami saya sedang berdiri di sebelah saya dan tiba-tiba suami saya angkat anak saya dalam keadaan kasar dan terus keluar dan buang anak saya seperti buang sampah di ruang meja makan. Saya terkejut dan terus ambil anak saya. Anak masa itu terus tiada suara. Saya takut dan riba anak saya bila saya bawa dia ke dalam bilik tidur. Semasa itu saya mahu telefon adik kepada suami saya mengenai perkara ini. Tetapi anak saya pula terjatuh dari riba saya semasa saya duduk di atas katil sebab suami saya tolak. Bila anak saya jatuh di atas tilam, suami saya seperti hilang akal terus tumbuk kepala anak saya berkali-kali. Saya cuba lindungi anak saya tetapi dia masih pukul. Saya terus bawa anak saya keluar dan minta tolong dengan jiran sebelah dan menjerit banyak kali. Suami saya seperti tersedar dan kemudian tolong saya buka pintu rumah. Kemudian saya keluar dan minta tolong jiran-jiran dan bawa saya, suami saya dan anak saya ke klinik Tuta. Kemudian doktor tengok anak saya dan perlu dihantar ke hospital. Selepas itu saya cakap dengan jiran saya pergi ke hospital yang terdekat iaitu di Hospital Pakar Putri. Kemudian anak saya diserahkan kepada

doktor dan kami semua tunggu di luar. Doktor kemudian bagi tahu yang anak saya tidak boleh hidup lagi dan hanya tunggu masa. Tidak lama selepas itu doktor di Hospital Pakar Putri telah bagi tahu yang anak saya telah meninggal dunia di sana. Kemudian telah buat laporan polis.

S: Adakah anda pasti?

J: Ya.

S: Adakah kamu mahu ubah atau pinda percakapan?

J: Tidak.

S: Adakah anda bercakap benar?

J: Ya.

[emphasis added]

[30] The two versions are completely at variance with each other and completely contradictory. In brief, the first version says that it was an accident that the accused "lepaskan" the deceased on the floor and in exh. D14, CCL used the words "unintentionally and mishandling my four months old baby and caused my baby's death ...". Exhibit D14 was written by her on 15 May 2007, that is nine days after she had given the first statement dated 6 March 2007.

[31] On the other hand, the second version as reflected in exh. P18 suggests that the accused intentionally "threw" ("buang") the deceased and subsequently hit the deceased's head several times. In other words, there was the intention to cause injury to the deceased.

[32] By reason of the above documentary exhibits the prosecution has introduced two conflicting versions or sets of evidence in respect of the said incident. The CCL's statements and all the contemporaneous documents made by her (ie, exhs. D13 and D14) when taken together make them totally unreliable and untrustworthy. They, therefore, have no credible value.

[33] In *PP v. Lee Eng Kooi* [1993] 2 CLJ 534 a similar situation existed. Two varying sets of evidence were introduced by the prosecution. The probative value of the evidence has been eloquently summed up by Vincent JC (as he then was) in the following words:

> As regards the 2nd charge, the contents of P27 and the oral evidence of PW3 and PW9 could not both be true and the court found that both the witnesses had lied on facts which were verifiable. In such a case where the prosecution leads two sets of evidence, each one of which contradicts and strikes at the other and shows it to be unreliable, the court will be left with no reliable and trustworthy evidence upon which a conviction of the accused might be based. There were also other infirmities and unsatisfactory features in the prosecution case which made it unsafe to call the accused to enter upon his defence.

[34] Similarly, in *Adzahaar bin Ahmad & Anor v. PP* [1996] 4 MLJ 85, the prosecution also introduced two sets of conflicting evidence on a material aspect of its case. Alauddin J (as he then was) followed Lee Eng Kooi and held that the variance struck at the heart of the prosecution case. Her Lordship said:

> By introducing P15A and B, the prosecution had without doubt, led two sets of evidence which were contradictory with each other. What then would be the effect of such contradiction? It would inevitably show that the evidence is unreliable and the result is that the court would be left with no trustworthy evidence upon which the conviction could be based.

[35] In *Yusoff Kassim v. PP* [1992] 3 CLJ 1535; [1992] 1 CLJ (Rep) 376 the prosecution case was that the appellant was carrying the brown bag containing the cannabis when he crossed the Thai-Malaysia border. However, there was conflicting evidence from another prosecution witness which confirmed the defence version that there were two bags, one brown and the other green which did not contain the cannabis. This acute conflict of evidence was resolved in favour of the appellant. Edgar Joseph Jr SCJ said:

> There was thus an acute conflict evidence upon a question of central importance in the case for the prosecution itself, giving rise to more than a reasonable doubt as to whether the appellant carried one or two bags, the benefit of which he was plainly entitled to.

[36] Further, if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and other to his innocence, the view which is in favour of the accused be adopted. In fact it was Spencer Wilkinson J who enunciated this legal proposition in *Tai Chai Keh v. PP* [1948] 1 LNS 122:

> Where there is more than one inference which can reasonably be drawn from a set of facts in criminal case, we are of the opinion that the inference most favourable to the accused should be adopted.

[37] Put it in another fashion, it means that when there is a doubt, the benefit of that doubt should be resolved in favour of the accused person. The principle is so well entrenched in our criminal jurisprudence and the Malaysian Courts have from time to time given effect to this trite principle of law.

[38] The learned deputy prosecutor submitted that the contradictions and discrepancies in the documents as alluded before are minor and not material and therefore would not render CCL's evidence entirely unreliable. In support of his proposition, the learned deputy prosecutor cited the following authorities:

(i) *Chean Siong Guat v. PP* [1969] 1 LNS 23

(ii) *Pie Chin v. PP* [1983] 1 CLJ 316; [1983] CLJ (Rep) 703 and

(iii) *Sarkar on Evidence,* edn, 15, at p. 109.

The legal principle that may be distilled from the authorities is this: overmuch importance cannot be given to minor discrepancies. Discrepancies which do not go to the root of the matter and shake the basic version of the witness, therefore, cannot be annexed with undue importance.

[39] With respect, this court disagrees. In this instant case, the contradictions and discrepancies are not of minor in nature because they are militated against the meat or core of the prosecution's case. These contradictions and discrepancies not only affect reliability but also create serious doubt on the prosecution's case. There seems to be no rhyme or reason for CCL to give two conflicting versions. The prosecution also did not proffer any reason why CCL has given two conflicting versions. It cannot be disputed that CCL is not reliable nor credible. She is in fact an untrustworthy witness for the prosecution. There is an added reason why her evidence cannot be relied upon. These various documents were made out of court and has not stood the test of cross-examination.

[40] The prosecution, through the various medical reports, namely exhs. P8, P9 and P10, confirmed that the accused at the material time was suffering from Huntington's disease. In particular, exh. P9 described his medical condition in the following manner:

> He was fidgety with involuntary movements over the face, tongue, neck, trunk, and limbs. The movements were rapid, purposeless, and haphazard in nature, following from one part of the body to another. He had difficulty sustaining a hand grip. He walked with a choreiform gait. Investigations were unremarkable, except for a mildly low level of vitamin B12 (126pmol/1).
>
> Overall, given the clinical presentation and family history, the diagnosis is suspected to be Huntington's disease. This is a hereditary progressive neurodegenerative disorder that affects the patient's movement, personality, mood, and cognition. The involuntary movements appeared clumsy and fidgety, with haphazard in coordinated movements flowing from one part of the body to another. The movements affect the patient's handgrip, speech, and walking.

[41] In the light of the uncontradicted medical evidence, there is no doubt that the accused was suffering from Huntington's disease (see exh. P10). The main features of this disease are (i) it is a neurodegenerative disorder; and (ii) that the disorder or illness affects, amongst others thing, his movements over face, tongue, neck trunk and limb which he would have no control.

[42] It is permissible and a legitimate matter as a matter of law for the accused to rely on the evidence adduced in the prosecution case itself without more, to satisfy the court that he was suffering from Huntington's disease. The medical evidence on the condition of the accused at the time of incident was not challenged at all. There is authority for the proposition that where the medical evidence is unchallenged and there is no evidence to the contrary a verdict of murder cannot stand. In this regard the court refers to *R v. Matheson* [1958] 1 WLR 474 where Lord Goddard CJ said at p. 478:

> If there are facts which would entitle a jury to reject or differ from the opinion of the medical men, this court would not, and indeed could not disturb their verdict, but if the doctor's evidence is unchallenged and there is no other on this issue, a verdict to contrary to their opinion would not be a true verdict in accordance with the evidence.

[43] Even assuming the first version given by CCL as true, it cannot be ruled out that baby was dropped because the accused had no control over his upper limbs. There is therefore no *mens rea* or the criminal intention to cause injury to his own child. The first version is further supported by the following statement made by the investigating officer (SP6 - ASP Abdul Hanif bin Atcha):

> OKT juga turut menunjukkan kepada saya kedudukan beliau ketika anaknya dipegang dan terjatuh.

[44] On the evidence adduced, it is very obvious that there is no *mens rea* on the part of the accused to cause any injury let alone death to his own son. According to exh. D14, CCL said "unintentionally" and SP6 (the I.O) said "terjatuh".

[45] Although motive is not a necessary ingredient of the offence of murder, it is a relevant factor to be considered:

> Sometimes motive plays an important role and becomes a compelling force to commit a crime and, therefore, motive behind the crime is a relevant factor for which evidence may be adduced. A motive is something which prompts a person to form an opinion or intention to do certain illegal act or even a legal act but with illegal means with a view to achieve that intention. In a case where there is clear proof of motive for the commission of the crime it afford added support to the finding of the court that the accused was guilty for the offence charged with. But it has to be remembered that the absence of proof of motive does not render the evidence bearing on the guilt of the accused nonetheless untrustworthy or unreliable because most often it is only the perpetrator of the crime alone who knows as to what circumstances prompted him to a certain course of action leading to the commission of the crime. (See A.I.R. [1994] S.C. 2420: [1994] Cr. LJ. 3271).

[46] In the circumstances of the case, there is absolutely no reason or motive for the accused to harm his child. The lack of motive in the instant case is an important indication that act of the accused in dropping the deceased was involuntary because the accused was at the material time was suffering from Huntington's disease.

[47] *Actus Non Facit Reum Nisi Mens Sit Rea* ("The deed does not make a man guilty unless his mind be guilty"). This maxim of common law is of fundamental importance in upholding the rule of law. To make a man liable to death for an offence which he does not know that he is committing and is unable to prevent is

repugnant to the ordinary man's conception of justice and bring the law into contempt (see the observation of Lord Reid in *Sweet v. Parsley* [1970] AC 132 at 149, HL, and his dissenting opinion in *Warner v. Metropolitan Police Commr* [1969] 2 AC 256 at 271-283, HL). The "act" which the *mens rea* must accompany must be voluntary in the sense that it is the product of the will of the accused, however reluctant he may be to do it (see *Lynch v. DPP for Northern Ireland* [1975] AC 653, HL).

[48] The crime of murder cannot be said to have been committed without proving intention or knowledge. "A bare killing, without proof of intention or knowledge as required by that section, can never be murder. It is not sufficient for the prosecution to prove merely the killing, without proving intention as required by that section, can never be murder ..." (See *Hashim bin Mat Isa v. PP* [1950] 1 LNS 23 per Willan J).

[49] It is for the prosecution to prove every element of the offence charged. One of the elements is the accused's state of mind ("*mens rea*"). In the instant case, after considering the evidence adduced, the necessary *mens rea* – if indeed the *actus reus* – has not been proved by the prosecution.

[50] In the circumstances, it is my positive finding that the prosecution had failed to prove a *prima facie* case for an offence punishable under s. 302 of the Code.

[51] However, this is not the end of the matter. In the court's view, the act of the accused in "unintentionally and mishandling four months old baby" knowing fully well that he was suffering from Huntington's disease, the effect of which he is unable to control his movements, was a "rash" act within the meaning of s. 304A of the Code. From the time the accused got hold of the deceased, he must be taken to have assumed the responsibility not to do anything rash or negligent that may cause the deceased to drop.

[52] The accused could not have been unaware of the likelihood of injury to the deceased when he held the deceased. He was expected under the circumstances to have taken proper precautions to avoid causing the injuries to the deceased which he failed to do so. He was therefore in my judgment rash or negligent.

[53] The Federal Court in *Adnan bin Khamis v. PP* [1972] 1 LNS 2 has laid down the test to be applied for determining the guilt or innocence of an accused person charged with rash or negligent conduct under s. 304A of the Code:

> Whether or not a reasonable man in the same circumstances would have been aware of the likelihood of damage or injury to others resulting from such conduct and taken adequate and proper precautions to avoid causing such damage or injury.

(See also *PP v. Mahfar bin Sairan* [2000] 7 CLJ 600; [2004] 4 MLJ 791, *Mohamed Yasin bin Hussin v. PP* [1976] 1 MLJ 156 and *Jacob Mathew v. State of Punjab & Anor* [2006] 6 CLJ 162).

[54] The court, therefore, finds that a *prima facie* case had been made out against the accused under s. 304A of the Code and the charge was amended accordingly. The amended charge was read and explained to the accused and he pleaded guilty to the charge. The court then found the accused guilty on the amended charge and he was sentenced to two years imprisonment with effect from the date of arrest.